



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUN 13 2011

Mike McNamara
Michael E. Zolandz
SNR Denton US LLP
1301 K Street, NW
Suite 600, East Tower
Washington, DC 20005

RE: MUR 6432
TransCanada Keystone Pipeline GP, LLC

Dear Messrs. McNamara & Zolandz:

On November 15, 2010, the Federal Election Commission notified your client, TransCanada Keystone Pipeline GP, LLC, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. The Commission re-notified your client of the complaint on November 30, 2010, due to a typographical error in the case number. On June 7, 2011, the Commission found, on the basis of the complaint and information provided in your response, that there is no reason to believe TransCanada Keystone Pipeline GP, LLC, violated 2 U.S.C. § 441e. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Roy Q. Luckett
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: TransCanada Keystone Pipeline GP, LLC **MURS:** 6401 and 6432

I. INTRODUCTION

This matter was generated by complaints filed with the Federal Election Commission by the Nebraska Democratic Party and Bold Nebraska, alleging violations of the Federal Election Campaign Act, of 1971, as amended ("the Act"), by TransCanada Keystone Pipeline GP, LLC.

II. FACTUAL AND LEGAL ANALYSIS**A. Facts**

The complaints allege that TransCanada Corporation, a Canadian corporation ("TransCanada"), or one of its foreign subsidiaries actually made donations of \$2,500 each to two Nebraska state candidate committees that the committees reported as made by either "TransCanada Keystone Pipeline" or "TransCanada Keystone Pipeline LP." Respondent TransCanada Keystone Pipeline, GP, LLC ("Keystone"), is a limited liability company registered in Delaware and headquartered in Texas with operations in Omaha, Nebraska. Keystone Response at 2. Keystone is the general partner in TransCanada Keystone Pipeline, LP ("Keystone LP"), a Delaware limited partnership. Keystone Supplemental Response at 1 and Response, Ex. A (organizational chart). Keystone jointly owns and controls Keystone LP with a limited partner, TransCanada Keystone Pipeline, LLC, another Delaware limited liability company. *Id.* Keystone and its limited partner are, in turn, subsidiaries of a Delaware corporation, TransCanada Oil Pipelines, Inc. All four entities are ultimately wholly-owned by TransCanada. Keystone Response, Ex. A. TransCanada is an energy infrastructure company that, among other things, develops and operates natural gas and oil pipelines in North America.

1 Keystone LP is apparently responsible for constructing and operating the U.S. portion of an oil
2 pipeline that transports crude oil from Alberta, Canada, to U.S. markets. *See* TransCanada
3 March 14, 2008, press release available at www.transcanada.com/3036.html.

4 As general partner, Keystone directs all of the activities of Keystone LP, and Keystone
5 employees approved and directed Keystone LP to make the donations at issue to the state
6 committees in this matter. Keystone Response at 2; Supplemental Response at 1. According to
7 Keystone, sometime before December 11, 2009, both Jensen, its Director of Government
8 Relations and a U.S. citizen, reviewed with outside counsel the permissibility and attendant
9 reporting requirements, under state law, of making donations to Nebraska state candidates.
10 Keystone Response at 2. Subsequently, Jensen approved donations of \$2,500 each to the
11 Governor Heineman Committee ("Heineman Committee") and Bruning for Attorney General
12 ("Bruning Committee"), the campaign committees of two Nebraska candidates. *Id.* Jensen sent
13 an email on December 11, 2009, instructing TransCanada's Accounts Payable staff to issue
14 checks from Keystone operating funds to the two state campaigns. *Id.*, Ex. B. The Accounts
15 Payable center, located in Calgary, Alberta, processed the checks. The Accounts Payable center
16 issued the checks on a Keystone-controlled "U.S. funds Citibank account" in the name of
17 Keystone LP and sent them to Jensen. *Id.* Jensen then forwarded the checks to Kissel E&S
18 Associates, an Omaha, Nebraska-based outside consulting firm engaged by Keystone in its
19 government relations efforts. Kissel representatives hand-delivered the checks to the candidate
20 committees, apparently in January 2010. *Id.*

21 Copies of the checks show that each was drawn on an account of "TransCanada Keystone
22 Pipeline, LP, 450 1st Street S.W., Calgary Alberta 502 5H1." Keystone Response, Ex. C. A
23 printed notation on the check face underneath the amount reads "U.S. FUNDS, TransCanada

1 Keystone Pipeline, LP." *Id.* The checks also indicate the bank where the account was
2 maintained is Citibank, N.A., at an address in New York City.

3 As required under Nebraska law, on February 2, 2010, Jensen filed with the Nebraska
4 Accountability and Disclosure Commission ("NADC") a Form B-7, "Report of Political
5 Contributions of a Corporation, Union or Other Association," for each donation. In those forms,
6 Keystone asserts that Jensen erroneously identified TransCanada Corporation as the donor.
7 Keystone's Response at 3, and Ex. D. The forms list another Omaha, Nebraska, address where
8 Keystone operates locally. Keystone's Response at 2, Ex. D. The Form B-7s have since been
9 amended to show Keystone LP as the donor. *Id.*, Ex. E.

10 The Heineman and Bruning Committees' initial disclosure reports show that they either
11 incompletely or erroneously reported the donations at issue.¹ The Heineman Committee reported
12 its donation as coming from TransCanada Keystone Pipeline at the 450 1st St. address printed on
13 the check but listed the city and state as Omaha, Nebraska, rather than Calgary. See MUR 6401
14 Complaint attachment, Heineman Committee NADC Form B-1, Schedule B, page 10 of 11;
15 MUR 6432 Complaint, Ex. 1. The Bruning Committee reported its donation as coming from
16 TransCanada Keystone Pipeline LP with no address whatsoever. See MUR 6401 Complaint
17 Amendment, Bruning Committee NADC Form B-1, Schedule B, page 11 of 12; MUR 6432
18 Complaint, Ex. 2.

¹ It appears that only the most current version of the state disclosure reports are available on the NADC's website since the state committees' reports for the period in question now available on-line have been amended. The NADC website states that the website database is based on the paper records filed with the NADC and that the paper records constitute the official records. See NADC website at <http://nadc.nol.org/ccdb/search.cgi>.

1 According to the complaint in MUR 6432, an auditor at the NADC discovered that the
2 street address in one of the disclosure reports belonged to TransCanada in Calgary, Alberta.²
3 MUR 6432 Complaint at 2 and Ex. 3. The NADC contacted the Bruning and Heineman
4 Committees on September 30, 2010, about the possibility that the Keystone LP donation may not
5 have been from a U.S. corporation. That same day, each committee separately issued refund
6 checks to "TransCanada Keystone Pipeline, LP." Keystone Response at 2. Keystone states that
7 the committees refunded the donations "out of an abundance of caution" despite clarifying
8 information it provided to them. Keystone Response at 3.

9 B. Analysis

10 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits a foreign
11 national, directly or indirectly, from making a contribution or donation of money or other thing
12 of value in connection with a Federal, State, or local election. 2 U.S.C.
13 § 441e(a)(1)(A), (B); 11 C.F.R. § 110.20(b). A foreign national is also prohibited from directly
14 or indirectly making an expenditure, an independent expenditure, or a disbursement in
15 connection with a Federal, State, or local election. 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R.
16 § 110.20(f). In addition, Commission regulations prohibit foreign nationals from directing,
17 dictating, controlling, or directly or indirectly participating in the decision-making process of any
18 person, such as a corporation, with regard to such person's election-related activities, including
19 decisions concerning the making of contributions, donations, expenditures, or disbursements in
20 connection with elections for any Federal, State, or local office. 11 C.F.R. § 110.20(i).

² The MUR 6432 complaint and an attached Internet article state that the Calgary street address was listed in the Bruning Committee's state disclosure report. The attached copies of the original paper reports, filed on April 12, 2010, however, show that the Heineman Committee listed a street address and the Bruning Committee listed no address. See MUR 6432 Complaint at Ex. 1 and Ex. 2.

1 The Act and Commission regulations define "foreign national" to include "foreign
2 principals," as defined in 22 U.S.C. § 611(b), and an individual who is not a citizen or national of
3 the United States and who is not a permanent resident. 2 U.S.C. § 441e(b). A "foreign
4 principal" includes "a partnership, association, corporation, organization, or other combination of
5 persons organized under the laws of or having its principal place of business in a foreign
6 country." 2 U.S.C. § 441e(b)(1) (citing 22 U.S.C. § 611(b)(3)).

7 In past advisory opinions, the Commission has permitted a U.S. subsidiary of a foreign
8 national corporation to make donations and disbursements in connection with state and local
9 elections when: (1) the donations and disbursements derive entirely from funds generated by the
10 subsidiary and not from funds provided by the foreign parent; and (2) when all decisions
11 concerning the donations and disbursements are made by U.S. citizens or permanent residents,
12 except for setting the overall budget for donations. *See* Advisory Opinions 2006-15
13 (TransCanada)(wholly-owned domestic subsidiaries of a foreign corporation that receive no
14 subsidies from their foreign parent or other foreign national may make donations to state and
15 local candidates as long as no foreign national participates in the decision-making, except for
16 setting overall budget amounts, and they use funds generated by their domestic operations
17 maintained in U.S. bank accounts); 1992-15 (Nassay Hawaii)(wholly-owned subsidiary of a
18 foreign corporation that received some subsidies from its foreign parent may make donations in
19 connection with state and local elections where it currently had substantial net earnings
20 generated by its domestic operations placed in segregated accounts that received no subsidies,
21 and provided that, in the future, it could demonstrate through a reasonable accounting method
22 that it had sufficient funds in its accounts to make donations, other than funds given or provided
23 by its foreign national parent).

1 Keystone states that the donations to the state candidate committees were made with U.S.
2 operating funds from an account maintained in a U.S. financial institution. *Id.* at 3. It points out
3 that the attached photocopies of the donation checks were drawn on a New York Citibank, N.A.
4 bank account and bear the notation "U.S. Funds" on the check faces. It also explains that the
5 Canadian address on the checks is that of TransCanada's Accounts Payable center, an office that
6 merely processes payments authorized by operating units of TransCanada, including Keystone.
7 *Id.* at 3. Finally, Keystone states that Keystone LP received no subsidies from foreign nationals
8 and generated substantial net earnings from which it funded the donations. Keystone
9 Supplemental Response at 1-2. There is no information indicating that the donations were
10 derived from non-U.S. funds.

11 With respect to the status of those involved in making the donations, Keystone's response
12 identifies only Beth Jensen, a U.S. citizen, and describes her role as approving and directing the
13 disbursement of the donations. The response also states, however, that no foreign individual or
14 entity "participate[d] in the decision making process regarding the making of the contributions"
15 and none directed or controlled the donations. Keystone Response at 3; *see also Id.* at 1.
16 Consequently, it may be that Ms. Jensen was the sole decision-maker involved in making the
17 donations or that Keystone decided not to specifically identify other non-foreign nationals who
18 were involved in the decision-making process. In any case, the Commission possesses no
19 information suggesting that any non-U.S. citizen or non-permanent resident was involved in
20 decisions to make the donations.

21 Based on Keystone's response, it appears that the donations to the Bruning and Heineman
22 Committees were made using funds generated by a domestic subsidiary that received no
23 subsidies from a foreign national, and that no foreign national was involved in the decision to

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- 1 **make the donations. Accordingly, the Commission has determined to find no reason to believe**
- 2 **that TransCanada Keystone GP, LLC, as the general partner that conducts the activities of**
- 3 **Keystone LP, violated 2 U.S.C. § 441e.**

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